Ministry of Defence v DeBique

'Maternity and soldiery are not the easiest of allies.' So began the judgment of Cox J in *Ministry of Defence v DeBique*, in which the Employment Appeal Tribunal considered for the first time the discriminatory impact of a combination of two 'provisions, criteria or practices' (PCPs), while also grappling with the notion of the Crown as an employer. The EAT's guidance is essential reading for employment practitioners running or resisting indirect discrimination claims. Sam Nicholls focuses squarely on the groundbreaking elements of the EAT's decision which, in the words of Cox J, raised 'interesting questions of both race and sex discrimination law, and of the interplay between the relevant statutory provisions'

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Background

The claimant, a national of St Vincent and the Grenadines (SVG), serving British soldier and single mother, was disciplined because she was not available for military deployment on a 24/7 basis (the 24/7 PCP), due to her childcare arrangements.

To solve her childcare problems the claimant proposed to bring her half-sister, a fellow SVG national, to the UK to provide care for her child. However, under Home Office immigration rules the half-sister, as a foreign national, could only enter the UK as a visitor and stay for a maximum of six months. The army had adopted and translated this rule so that the sister was not allowed to stay in services families accommodation (the immigration PCP). This prevented the claimant from resolving her child care issues and from being deployable on a 24/7 basis.

The army continued to discipline the claimant because of her inability to comply with the 24/7 PCP and she eventually felt she had little choice but to resign. The claimant then brought proceedings against the Ministry of Defence alleging both indirect sex and race discrimination in the way in which the combination of the two PCPs were applied to her.

The employment tribunal's findings

The tribunal found that the 24/7 PCP put the claimant, as a single mother, at a disadvantage, but that it was justified as a proportionate means of achieving a legitimate aim. However, the tribunal went on to hold that the claimant had been the victim of indirect sex and race discrimination through the way in which the combination of the 24/7 PCP and the immigration PCP was applied to her. The MoD had failed to show that the PCPs were a proportionate means of achieving a legitimate aim.

The EAT decision

The MoD appealed against the tribunal's findings, pursuing no fewer than nine separate grounds of appeal. However, the MoD failed to persuade the EAT that there was merit in any of its arguments. Much of the EAT's judgment is based on the assumption, unchallenged on appeal by the MoD, that the tribunal was correct to conclude that the MoD and the Home Office, as emanations of the Crown, are indivisible and inseparable for the purposes of discrimination claims.

A challenge to the immigration rules?

The MoD contended that the claim was a direct challenge to the immigration rules and therefore impermissible by virtue of s.19D of the Race Relations Act 1976; if it was a challenge to the immigration rules, the correct way for the claimant to challenge it would have been by way of judicial review in the administrative court. The EAT made short work of the MoD's submission, pointing out that the claim was:

> *'Brought under part II [of the RRA], governing discrimination in the employment field, by the claimant in her capacity as an 'employee' in the army … it is irrelevant that the immigration PCP identified arose from the operation of the immigration rules; or that those rules have a statutory source; or that they are applied by the SSHD when making immigration decisions.'*

Was the PCP applied to the claimant by her employer?

The MoD followed its primary attack on the tribunal's findings by contending that the immigration PCP was not applied to the claimant by her employer acting in its capacity as employer. This was based upon the premise that the MoD did not apply the immigration PCP itself but instead 'simply reflected the immigration rules and their effect in their own guidance', and that the MoD could not be liable for the acts or omissions of another department, the Home Office. Therefore, the application by the Home Office of the immigration PCP did not 'relate to service' in the army within the meaning of s.75(8) of the RRA.

In rejecting the MoD's contention the EAT held that:

> *'It would be an unnecessary and impermissible gloss on the words of the statute to require, as a further precondition, that the PCP had to be applied to the claimant by her employer "acting in its capacity as employer".'*

The EAT's judgment was infused with commendable realism and practicality, which has helped to simplify this complicated area of law

It seems that even if the EAT was wrong to accept that the Home Office and the MoD were the same legal entity, the decision of the EAT on this point is unassailable because the army incorporated the immigration rule into its own policies and practices and applied them to foreign and commonwealth soldiers. The MoD also failed to take any steps to alleviate or eradicate the disadvantage; for instance, by asking the Home Office to grant an exception as had happened in the past.

Who did the immigration PCP apply to?

The MoD contended that the tribunal had erred in concluding that the immigration PCP was applied to the claimant as it must be in accordance with s.1(1A) of the RRA. The MoD asserted that the immigration PCP was not applied to the claimant but was instead applied to the claimant's sister.

The MoD's submissions found no favour with the EAT, which described as 'unimpeachable' the tribunal's finding that the immigration PCP had a direct impact on the claimant because it was adopted by the MoD, incorporated into army policy and used by the claimant's commanding officer as the reason why the claimant could not bring her sister to the UK.

It was therefore not necessary for the EAT to rule on the claimant's interesting and novel argument, in the alternative, that the concept of 'associative discrimination', referred to in the context of disability discrimination in *EBR Attridge Law LLP & anor v Coleman*, should apply also to indirect discrimination under the RRA where a PCP is applied to a third party but the disadvantage is suffered by the claimant employee.

A common-sense approach

The MoD also argued that the tribunal erred in selecting the pool from which it made the relevant comparison. The EAT rejected the MoD's submission, using a large dose of common sense, holding that the tribunal had directed itself correctly according to the responsibility placed upon it, which was to:

> *'Consider the position in respect of different pools within the range of decisions open to them [the tribunal]; but they are entitled to select from that range the pool which they consider will realistically and effectively test the particular allegation before them.'*

Tribunals should, of course, be careful to provide full and logical reasons for the selection and rejection of alternative pools. However, as long as the pool chosen is 'logical, permissible and effective for the purpose of testing the particular allegation', it seems that the tribunal will not slip into error and the EAT will refuse to intervene.

A Combination of PCPs?

When approaching the MoD's contention that the tribunal had erred in conflating the effect of the two separate PCPs to find unlawful indirect discrimination under the SDA and RRA, the EAT recognised that 'discrimination is a multi-faceted experience'.

Following careful consideration of the principles involved, the EAT found that there was no error of law in the conflation of the two PCPs. The factual reality of the situation was that the claimant was subjected to a 'double disadvantage' because she was both a 24/7 female soldier with a child and because she was a woman of Vincentian national origin, for whom childcare assistance from a live-in Vincentian relative was not permitted by the army.

This is the first time that an appeal court has considered the combined effect of two PCPs. The practical importance of this finding cannot be underestimated: tribunals must not overlook the 'factual reality of the situation' in determining whether a combination of PCPs has a discriminatory impact, even when those constituent PCPs arise under different anti-discrimination statutes.

Justification

Finally, the EAT held that the tribunal did not err in law when it accepted that although the immigration PCP pursued the legitimate aim of controlling the UK's borders, the MoD's failure to take steps to alleviate the effect of the PCP on the claimant meant that it was not a proportionate means of achieving a legitimate aim when it came to the claimant's service in the army.

Postscript

The EAT's judgment was infused with commendable realism and practicality, which has helped to simplify this complicated area of law. This will be of considerable assistance to employment practitioners who are faced with navigating the potentially treacherous seas of indirect discrimination law.

However, it remains to be seen whether the concept of the MoD and the Home Office, as emanations of the Crown, being indivisible and inseparable for discrimination purposes is correct. It seems that this assumption is ripe for determination in the higher courts, sooner rather than later.

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Cases referred to:

Ministry of Defence v DeBique (UKEAT/0048/09 & UKEAT/0049/09)

EBR Attridge Law LLP & anor v Coleman [2008] IRLR 722 ECJ